



Signed and Filed: July 26, 2012

**THOMAS E. CARLSON
U.S. Bankruptcy Judge**

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 In re) Case No. 11-10272
11 PAUL SCHIMMEL,) Chapter 7
12)
13)
14 Debtor.)
15 _____)
16 MCCALL RIVER RANCH COMPANY,) Adv. Proc. No. 11-1138
17 Plaintiff,)
18 vs.)
19 PAUL SCHIMMEL,)
20 Defendant.)

MEMORANDUM DECISION

21 The court held a trial in the above-entitled action on June
22 26-27, 2012. Spencer P. Scheer appeared for Plaintiff/Creditor
23 McCall River Ranch Company. Craig K. Welch appeared for
24 Defendant/Debtor Paul Schimmel. For the reasons set forth below,
25 the court determines that Debtor should not receive a discharge.

26 || FACTS

27 Debtor Paul Schimmel (Debtor) has been an insurance agent
28 licensed by the State of California for 28 years. He is a

1 sophisticated businessman, has an M.B.A. degree, and fully
2 understands all the financial aspects of his insurance business.

3 A large portion of Debtor's insurance business involved the
4 sale of life insurance policies, and much of the income of that
5 business came from the receipt of renewal commissions paid on life
6 insurance policies. A renewal commission is paid by an insurer to
7 the agent who originated the policy when the policyholder renews
8 the policy for a subsequent year by paying the premium for that
9 subsequent year. Unlike the origination of the policy, which
10 involves considerable work by the agent and for which the agent
11 receives from the insurance company a large portion of the first-
12 year premium, collection of the renewal commission does not require
13 the agent to perform any services. Collection of the renewal
14 commission is automatic for each year that the policyholder renews
15 the policy. Stated in the most practical sense, the agent will
16 continue to receive renewal commissions until the policyholder dies
17 or cancels the policy.

18 Debtor operated his insurance business through a wholly owned
19 California corporation called Skyda Financial, Inc. (Skyda).
20 Debtor assigned to Skyda the right to receive all renewal
21 commissions. Both pre- and post-petition Debtor paid his personal
22 living expenses from Skyda's bank accounts.

23 Debtor filed a Chapter 7 petition in this court on
24 January 27, 2011. In his bankruptcy schedules, Debtor listed the
25 Skyda shares as having zero value. Debtor claimed an exemption in
26 the Skyda shares in the amount of \$100. Nowhere in the schedules
27 or otherwise did Debtor state that he intended to claim as exempt
28 more than \$100 from the proceeds of the Skyda shares, and that

1 instead he claimed the entire asset as exempt.

2 At the section 341 meeting of creditors, the Chapter 7
3 trustee (Trustee) asked Debtor to produce a balance sheet for
4 Skyda. In May 2011, Debtor provided to Trustee a balance sheet
5 (the Balance Sheet) that showed Skyda to be insolvent, listing
6 debts totaling \$736,000, and listing only one asset, business
7 equipment valued at \$3,000. The Balance Sheet did not list as an
8 asset any renewal commissions that Skyda expected to receive in the
9 future in respect of life insurance policies that had been
10 originated pre-petition. But in the first seven months after the
11 petition date Skyda received renewal commissions in amount of
12 \$57,802. See Exhibits 14-21. (Henceforth the court will use the
13 capitalized term Renewal Commissions to refer to those commissions
14 to be received post-petition in respect of insurance policies
15 originated pre-petition.)

16 Post-petition Renewal Commissions were deposited into Skyda's
17 bank accounts and were used to pay personal living expenses of
18 Debtor and his wife. At trial, Debtor did not contend that any of
19 the Renewal Commissions were used to pay any of the debts listed on
20 the Balance Sheet.

21 Debtor caused Skyda to dissolve eight months after the
22 petition date. On September 21, 2011, he filed a Domestic Stock
23 Corporation Certificate of Dissolution with the California
24 Secretary of State (the Certificate). In the Certificate, Debtor
25 stated under penalty of perjury: "The corporation's known debts and
26 liabilities have been paid as far as its assets permitted."

27 At the time of its dissolution, Skyda was still entitled to
28 receive Renewal Commissions of a significant amount. In the three

1 months after the filing of the Certificate, insurers paid Renewal
2 Commissions totaling more than \$24,000. See Exhibits 23-26.
3 Debtor put those post-dissolution Renewal Commissions into his
4 personal bank account. He did not use those Commissions to pay
5 Skyda creditors, nor did he pay those Commissions to Trustee.

6 The Certificate of Dissolution also stated that all of Skyda's
7 assets were distributed by the corporation upon its dissolution.
8 Based on the fact that Debtor put the Renewal Commissions received
9 after the dissolution into his personal bank account, I find that
10 the right to receive those post-dissolution Renewal Commissions was
11 distributed from Skyda to Debtor.

12 Among Debtor's pre-petition debts was his liability to
13 Plaintiff under a guarantee. Plaintiff timely filed this denial-
14 of-discharge action on May 2, 2011.

15 **DISCUSSION**

16 A. Legal Standard for Denial of Discharge

17 Section 727(a)(2)(B) provides that the court shall not grant a
18 discharge to a debtor who transfers or conceals property of the
19 estate after the petition date with the intent to hinder, delay, or
20 defraud creditors or the trustee.

21 B. Renewal Commissions as Property of the Estate

22 The shares of Skyda and all rights thereunder became property
23 of the bankruptcy estate pursuant to section 541(a)(1).

24 The Skyda shares are not wholly exempt. Although Debtor
25 claimed an exemption of \$100 in the shares, and scheduled the value
26 of the shares as \$0, Debtor did not give notice that he was
27 claiming the assets as wholly exempt, and is therefore entitled to
28 claim as exempt only \$100 from the proceeds of the shares. Schwab

1 v. Reilly (In re Reilly), 130 S. Ct. 2652 (2010).

2 Renewal Commissions received post-petition are received in
3 respect of rights that exist on the petition date. Although they
4 are contingent upon the policyholder paying the renewal premium,
5 they are not the product of post-petition personal services by the
6 Debtor or any action by Skyda, and are not thereby excluded from
7 the bankruptcy estate under section 541(a)(6). Towers v. Wu (In re
8 Wu), 173 B.R. 411, 414-416 (B.A.P. 9th Cir. 1994); Wicheff v.
9 Baumgart (In re Wicheff), 215 B.R. 839, 841-42 (B.A.P. 6th Cir.
10 1998).

11 The right to receive Renewal Commissions was an asset of Skyda
12 until the date Skyda was dissolved, at which time it was
13 distributed either to creditors of Skyda or to the shareholder of
14 Skyda. I find that Debtor caused the right to receive Renewal
15 Commissions to be distributed to himself as the sole shareholder of
16 Skyda.

17 When Debtor caused the Renewal Commissions to be distributed
18 to himself, rather than to creditors of Skyda or Trustee, he
19 diverted assets of the bankruptcy estate to himself.¹ This is so,
20

21 ¹ That it may have been wrongful toward Skyda creditors for
22 Debtor to distribute the Renewal Commissions to himself as
23 shareholder, rather than to Skyda creditors, does not mean that the
24 transfer was not effective and that the Renewal Commissions did not
25 become property of the estate. Under California law, the recipient
26 of such a transfer may be liable to creditors for the amount of the
27 transfer, but the transfer is not void. Cal. Corp. Code §§ 2009,
28 Pacific Scene, Inc. v. Penasquitos, 46 Cal. 3d 407 (1988).

That it would not have been wrongful to the estate for Debtor
to cause post-petition Renewal Commissions to be distributed to
Skyda creditors does not mean it was not wrongful to the estate for
Debtor to distribute Renewal Commissions to himself. That is so,
because upon the dissolution of Skyda, Renewal Commissions not
distributed to Skyda creditors were distributed in respect of the
Skyda shares and were clearly property of the estate as fruits of
those Skyda shares. See sections 541(a)(1) and 541(a)(6).

1 because that distribution was in respect of the Skyda shares, which
2 were property of the estate under section 541(a)(1). As fruits of
3 the Skyda shares, the Renewal Commissions were likewise property of
4 the estate under section 541(a)(6).

5 Thus, Debtor transferred to himself and concealed from
6 creditors and Trustee property of the estate consisting of Renewal
7 Commissions received after the dissolution of Skyda. The amount of
8 such commissions was material (\$24,000).

9 C. Fraudulent Intent

10 I find that Debtor appropriated the post-dissolution Renewal
11 Commissions to his own use knowingly, intentionally, and with the
12 intent to defraud creditors and Trustee. In making this finding, I
13 note and rely upon the following considerations.

14 First, Debtor is a very sophisticated businessman with an
15 M.B.A. degree, who has been in the insurance business for 28 years.
16 Debtor understood fully that Skyda's right to receive future
17 Renewal Commissions was an asset of Skyda as of the petition date.
18 Although the right to receive a Renewal Commission is contingent
19 upon the policyholder paying the renewal premium, Debtor knew that
20 policyholders routinely did so without any action by Skyda or
21 Debtor. Debtor understood that the right to receive Renewal
22 Commissions was not dependent upon Skyda or Debtor performing post-
23 petition services.

24 Second, in his testimony, Debtor showed an excellent memory of
25 facts regarding his business operations. He remembered the amounts
26 of those Commissions, the policyholders in question, and the
27 insurance companies from which the Commissions were due. It is
28 also worthy of note that the amount of Renewal Commissions received

1 each month was relatively steady and predictable. Between the
2 petition date and the dissolution of Skyda, such Commissions
3 averaged \$8,257 per month. After the dissolution of Skyda, such
4 Commissions averaged \$8,237 per month. Debtor was aware at all
5 times of the Renewal Commissions that Skyda would collect post-
6 petition.

7 Third, Debtor attempted to conceal from Trustee the existence
8 of Skyda's right to receive post-petition Renewal Commissions. The
9 Balance Sheet for Skyda that Debtor presented to Trustee indicated
10 that Skyda's only asset was office equipment worth \$3,000. The
11 value of the omitted Renewal Commissions was many times the value
12 of the assets shown.

13 Fourth, Debtor claimed that Skyda was insolvent in order to
14 dissuade Trustee from liquidating Debtor's interest in Skyda, but
15 Debtor did not act as if Skyda was insolvent. After the petition
16 date, Debtor used the assets of Skyda to pay his personal living
17 expenses rather than Skyda's debts. Debtor then dissolved the
18 corporation without distributing all its remaining assets to
19 creditors, instead distributing those remaining assets (the right
20 to Renewal Commissions) to himself for his own personal use. This
21 inequitable conduct toward Skyda creditors suggests that Debtor's
22 failure to disclose the Renewal Commissions and pay them to Trustee
23 was not the product of some innocent mistake.

24 || CONCLUSION

25 Debtor should be denied discharge pursuant to section
26 727(a)(2)(B). It is not necessary to address the other bases for
27 denial of discharge raised by Plaintiff.

END OF MEMORANDUM DECISION